Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-201–06 OF 2017
UMI KALTHUM, ZALEHA YUSOF AND YAACOB MD SAM JJCA
20 AUGUST 2019

Civil Procedure — Judicial review — Appeal against — Impugned decisions of respondents to impose travel ban to appellant — Whether judicial review application and appellant's appeal became academic as travel ban had been lifted

This was an appeal against the decision of the learned High Court judge in dismissing the appellant's judicial review application. The learned High Court judge, in delivering judgment found that the respondents' decision was not one that manifestly suffered from any of the recognised legal infirmities of illegality, irrationality and procedural impropriety warranting any crucial intervention but did not address the issue whether the action had become academic as travelling ban of the appellant had been lifted. Learned counsel for the appellant had urged the court to continue to hear this appeal as there was no assurance that the respondents would not again blacklist the appellant in future. He further argued that the decision of this court would also help others who faced with the same problem. Learned senior federal counsel however, urged the court to dismiss the appeal as it was an exercise of futility and academic as the blacklisting had been lifted since 17 May 2016. He submitted that a court will not act in vain or grant academic declaration.

Held, dismissing appellant's appeal with no order as to costs:

(1) The judicial review application had become academic as the travel ban against the appellant had been lifted. To ask the court to make an order of prohibition to prevent the respondents from making any subsequent decision to blacklist the appellants from travelling overseas would mean to ask the court to make an order on an issue which was not before the court yet, something which was hypothetical let alone pre-empting the decision which had yet to be made. But it was trite that courts were not 'debating club nor an advisory bureau' and would only decide on live, practical questions and had no concern with hypothetical, premature and academic questions (see paras 5 & 10).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi dalam menolak permohonan semakan kehakiman perayu. Hakim Mahkamah Tinggi, dalam menyampaikan penghakiman mendapati bahawa keputusan

responden bukanlah satu yang mudah dilihat mengalami apa-apa kelemahan undang-undang yang diketahui, tidak rasional dan prosedur tidak teratur yang membenarkan apa-apa campur tangan penting tetapi tidak mengupas isu sama ada tindakan telah menjadi akademik memandangkan sekatan perjalanan perayu telah diangkat. Peguam perayu telah mendesak mahkamah untuk terus mendengar rayuan ini memandangkan tiada jaminan bahawa responden tidak akan lagi menyenarai hitam perayu di masa depan. Beliau terus berhujah bahawa keputusan mahkamah ini akan juga membantu yang lain yang mengalami masalah yang sama. Peguam kanan persekutuan walau bagaimanapun, mendesak mahkamah untuk menolak rayuan memandangkan ia adalah tindakan yang sia-sia dan akademik memandangkan senarai hitam telah diangkat sejak 17 Mei 2016. Beliau menghujahkan bahawa mahkamah tidak akan bertindak sia-sia ataupun memberikan deklarasi akademik.

Diputuskan, menolak rayuan perayu tanpa perintah terhadap kos:

(1) Permohonan semakan kehakiman telah menjadi akademik memandangkan sekatan perjalanan terhadap perayu telah diangkat. Untuk meminta mahkamah untuk membuat perintah larangan untuk mengelakkan responden-responden daripada membuat apa-apa keputusan lanjut untuk menyenarai hitam perayu-perayu dari ke luar negara akan bermaksud meminta mahkamah untuk membuat perintah atas isu yang bukan berada di mahkamah lagi, sesuatu yang berdasarkan andaian dengan menjangka keputusan yang belum pun dibuat. Tetapi ia adalah nyata bahawa mahkamah-mahkamah bukanlah 'debating club nor an advisory bureau' dan hanya akan memberi keputusan atas isu yang nyata, soalan-soalan yang praktikal dan tidak mempunyai kebimbangan dengan andaian, pra-matang dan soalan-soalan akademik (lihat perenggan 5 & 10).]

Notes

For cases on appeal against judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5933–5935.

Cases referred to

Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors [2006] 3 MLJ 208, CA (distd)

Barnato (deceased); Joel and Another v Sanges and Others, Re [1949] 1 All ER 515, CA (refd)

Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor [2014] 6 MLJ 766, FC (refd)

Macnaughton v Macnaughton Trustees 1953 SC 387 (refd)

Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh [1992] 1 MLJ 147; [1992] 1 CLJ Rep 212, SC (distd)

Nik Noorhafizi bin Nik Ibrahim & Ors v Public Prosecutor [2013] 6 MLJ 660, CA (refd)
Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran [2006] 6 MLJ 689, FC (refd)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 3(3)(a)
Federal Constitution arts 4, 5(1), 8, 10(1)(a), 160
Finance Act 1940 s 43
Immigration Act 1959/63 ss 59, 59A
Police Act 1967 s 27

Gurdial Singh Nijar (Abraham Au Tian Hui, Ngeow Chow Ying and Latheefa Koya with him) (Sreenevasan) for the appellant.
Shamsul Bolhassan (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Zaleha Yusof JCA:

[1] The appellant in this appeal was the chairperson of Bersih 2.0, a coalition of 85 Malaysian non-governmental organisations (NGOs) advocating for a free and fair election in Malaysia. As a recognition to her contributions in the advancement of human rights in Malaysia, she had been awarded with a prestigious award known as the Gwangju Prize for Human Rights ('the award') by the South Korean May 18th Memorial Foundation.

[2] She was scheduled to travel to South Korea on 15 May 2016 to attend and accept the award at the award ceremony. However at the Kuala Lumpur International Airport, she was stopped by the Malaysian Immigration authorities on the ground that her name had been blacklisted, thus, she was barred from travelling abroad. She later discovered that the decision of the respondents to blacklist her from travelling abroad was made since 6 January 2016.

[3] Aggrieved with the decision of the respondents, the appellant had on 28 July 2016 filed an application for judicial review ('JR') for, inter alia, the following reliefs:

(1) an order of certiorari to quash the decision made by the respondents to blacklist the appellant from travelling overseas, which was brought to the appellant's attention on the day she was scheduled to leave Malaysia on 15 May 2016 ('impugned decision');

(2) a declaration that the impugned decision made by the respondents to blacklist the appellant from travelling overseas in the circumstances is a

breach of arts 5(1), 8 and/or 10(1)(a) of the Federal Constitution and as a result, unconstitutional and void;

(3) a declaration that the respondents do not have the power to reach the impugned decision and therefore acted in excess of jurisdiction;

(4) a declaration that the respondents do not have an unfettered discretion in arriving at the impugned decision;

(5) a declaration that the respondents cannot act under s 59 of the Immigration Act 1959/63 to deny the appellant a right to natural justice as this is in violation of the Federal Constitution in particular art 160 read together with art 4 of the Federal Constitution and relevant case law;

(6) a declaration that the following provisions of the Immigration Act 1959/63 are unconstitutional:

(a) s 59 which excludes the right to be heard; and/or

(b) s 59A which excludes judicial review;

(7) an order of prohibition to prevent the respondents from making any subsequent decisions to blacklist the appellant from travelling overseas in similar circumstances; and

(8) in the alternative to 6, an order of prohibition to prevent the respondents from making any subsequent decisions to blacklist the appellant from travelling overseas without furnishing her with the reasons and according her a right to be heard.

[4] The learned High Court judge dismissed the JR application as Her Ladyship found that the respondents' decision was not one that manifestly suffers from any of the recognised legal infirmities of illegality, irrationality and procedural impropriety warranting any curial intervention. Hence, the appeal before us.

THE APPEAL BEFORE US

[5] Upon perusal of the records of appeal, it appeared to us that this JR application had actually become academic as the first respondent in para 13 of his affidavit in reply, and the second respondent, in para 4 of his affidavit in reply as well as exh MHK1, had shown that the ban had been lifted on 17 May 2016, two days after the appellant was stopped at the Kuala Lumpur International Airport and even before the JR was filed in court. See records of appeal Vol 2(1) pp 93, 114 and 174–175.

[6] This issue that the matter had been rendered academic had been raised by the parties in their submission before the High Court. See supplementary

record of appeal, notes of evidence pp 19–52. Unfortunately this issue had not been addressed by the learned High Court judge in her grounds of judgment.

[7] We therefore invited the parties to address us on this issue as to whether the appeal was now academic as the travel ban had been lifted. Learned counsel for the appellant had urged this court to continue to hear this appeal as there was no assurance that the respondents will not again blacklist the appellant in future. He argued that the decision of this court would also help others who are faced with the same problem. He relied heavily on the Federal Court case of *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran* [2006] 6 MLJ 689 and the Court of Appeal case of *Nik Noorhafizi bin Nik Ibrahim & Ors v Public Prosecutor* [2013] 6 MLJ 660 to support his argument.

[8] Learned senior federal counsel however urged the court to dismiss the appeal as it is an exercise of futility and academic as the blacklisting had been lifted since 17 May 2016. He submitted that a court will not act in vain or grant academic declaration. He cited the Court of Appeal case of *Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors* [2006] 3 MLJ 208 and the Supreme Court case in *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh* [1992] 1 MLJ 147; [1992] 1 CLJ Rep 212.

[9] With due respect to learned counsel for the appellant, the two authorities cited by him are distinguishable. *Arasa Kumaran*, was on the proper interpretation to be accorded to s 3(3)(a) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. *Nik Norhafizi* case, was on the constitutionality of s 27 of the Police Act 1967. Both involved points of statutory construction whereas the issue before us was on the discretionary power of the respondents whose decision under s 59A of the Immigration Act 1959/63 are not amenable to JR. To argue that the decision of this case will assist other blacklisted cases in future was in our view misplaced. Whether to impose a travel ban will involve consideration of facts of each case. No two cases are similar,

[10] The travel ban against the appellant had been lifted. To ask this court to make an order of prohibition to prevent the respondents from making any subsequent decision to blacklist the appellants from travelling overseas would mean to ask this court to make an order on an issue which is not before the court yet, something which is hypothetical let alone pre-empting the decision which has yet to be made. But it is trite that courts are not 'debating club nor an advisory bureau' and will only decide on live, practical questions and have no concern with hypothetical, premature or academic questions' (see *Macnaughton v Macnaughton Trustees* 1953 SC 387).

[11] In a more recent case, the Federal Court in *Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor* [2014] 6 MLJ 766 had held, inter alia:

> (5) The grant of declaration is in the discretion of court. The court will not act in vain and grant declarations that are of no utility or in regard to matters which are no longer 'live issue' or has become academic ...

[12] In *Re Barnato (deceased); Joel and Another v Sanges and Others* [1949] 1 All ER 515, the Court of Appeal of England dealt with a question whether the Crown, in this case the Inland Revenue Commissioners, could be joined in proceedings, whether started by originating summons or by writ, in order to decide future and hypothetical matters such as that of a presumptive claim for estate duty under s 43 of the Finance Act 1940. The Court of Appeal held that the question involved was future and hypothetical and dismissed the appeal against the order of Harman J which struck out the Inland Revenue Commissioners from being joined as defendants.

[13] This decision of *Re Barnato*, had been followed by this court in *Ahmad Saidi*.

CONCLUSION

[14] For all the above reasons, we totally agreed with learned senior federal counsel that the appeal ought to be dismissed for being not only academic but hypothetical. We therefore unanimously dismissed this appeal with no order as to costs.

Appeal dismissed with no order as to costs.

Reported by Addibah Adnan